No. 16469

United States Court of Appeals

For the Ninth Circuit

M. M. ZENOFF, COMMERCIAL CREDIT CORPORATION and SOUTHWESTERN PUBLISHING COMPANY, INC.,

Appellants,

vs.

CHARLES J. KETCHAM, doing business as Lake Motors and Studebaker Sales and Service, and Studebaker Packard Sales Agency,

Appellee.

Appeal from the United States District Court for the District of Nevada

BRIEF FOR THE APPELLANT

MAGLEBY & POSIN
ALBERT M. DREYER
109 South Third Street
Las Vegas, Nevada
Attorneys for Plaintiff

Table of Contents

Table of Authorities

Texts and Annotations

NO. 16469
UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

M. M. ZENOFF, COMMERCIAL CREDIT CORPORATION and SOUTHWESTERN PUBLISHING COMPANY, INC.,

Appellants,

vs.

CHARLES J. KETCHAM, doing business as Lake Motors and Studebaker Sales and Service, and Studebaker Packard Sales Agency,

Appellee.

APPELLANTS' OPENING BRIEF

JURISDICTION

This is an appeal from an order dismissing a petition to have the Appellee adjudicated an involuntary bankrupt. The jurisdiction of the District Court was invoked under Sections 2(1) and 32(b) and (c) of the Bankruptcy Act (11 U.S.C. Sec. 11(1) and 55(b) and (c)). The order dismissing the proceedings was signed and filed on February 26, 1959 (R 41-47). It was not entered on the bankruptcy docket until March 3, 1959, nor was any notice of the entry thereof given until the last mentioned date when it was given by mail. Notice of Appeal was filed on April 3, 1959 (R 47). The jurisdiction of this Court is invoked under the provisions of Sections 24 and 25 of the Bankruptcy Act (11 U.S.C. 47 and 48).

STATEMENT OF THE CASE

On March 1, 1957, the petitioning creditors, M. M. Zenoff, U. S. Tire Supply, Inc., and Commercial Credit Corporation, filed their petition to have Appellee, Charles J. Ketcham, adjudged an involuntary bankrupt (R. 3-6). Upon the filing of the petition, a general order of reference was made, referring the proceedings to the Honorable John C. Mowbray, one of the Referees in Bankruptcy of the Court below (R. 7). Appellee filed an answer to the petition, wherein, among other things, he challenged the jurisdiction of the District Court on the ground that for more than six months before the filing of the petition he had been a resident of the State of California and that he neither resided in, nor had his domicile or a place of business within, the District of Nevada for a longer portion of six months next preceding the filing of the petition (R. 7-9). The alleged bankrupt, Charles J. Ketcham, having, between the date of the filing of the petition and the date of the filing of his answer, paid one of the petitioning creditors, U. S. Tire Supply, Inc. (R. 62-63), an amended and supplemental petition was filed in which Southwestern Publishing Co., Inc. was substituted as a petitioning creditor (R. 15-18). Thereafter, the matter came on for hearing before the Referee on April 15, 1957, it being stipulated that the Appellee's answer to the original petition should stand as his answer to the amended and supplemental petition, except that he admitted his indebtedness to Southwestern Publishing Co., Inc. in the sum of $167.25 (R. 57). At this hearing, Appellee again urged his challenge to the jurisdiction of the District Court to entertain the proceedings. It was shown, however, that Appellee had previously operated an automobile business in Las Vegas, Nevada; that the great majority of the Appellee's creditors were Nevada residents, and the greater part of his assets were located in that State (R. 58, 61-63, 64). A second supple-

mental and amended petition was filed to allege these facts (R. 19-22).

Concurrently with the filing of the original petition a petition for an injunction to restrain the foreclosure sale under a deed of trust covering real property comprising the greater part of the Appellee's assets was filed by the petitioning creditors (R. 9-12). On the basis thereof, the Referee issued a temporary restraining order and order to show cause, restraining the threatened foreclosure sale (R. 13-14). The order to show cause why an injunction permanently restraining the foreclosure sale should not issue was originally made returnable on March 22, 1957. By stipulation of counsel, the hearing thereon and the temporary restraining order were continued until the hearing on the petition to adjudicate the Appellee a bankrupt (R. 92). At that hearing, it was shown that the value of the property subject to the deed of trust exceeded by at least $50,000.00 the amount of the obligation which the trust deed secured (R. 62, 78), and that this equity would be lost to the general creditors of the Appellee if the foreclosure sale were allowed to proceed. At the conclusion of the hearing, the Referee ordered that the temporary restraining order be continued in effect, pending a further order in the proceeding (R. 93).

On June 18, 1957, the Referee signed an order in which he found "that the respondent Charles J. Ketcham is now and has been for more than six months prior to March 1, 1957 a resident of and domiciled within the State of California, and the Court is, therefore, without jurisdiction; that accordingly, said petition should be dismissed with costs." This order was not transmitted to, or entered, by the Clerk of the Court below, as required by Section 39(a) (9) of the Bankruptcy Act (11 U.S.C. 67(a) (9)) and General Order No. 1 until June 26, 1957, nor were petitioning creditors given any notice of the signing, making

or entry of the order before that date, when notice of the entry thereof was mailed to them by the Clerk. The time within which a petition for the review of that order might be filed, therefore, ran from that date (**Rosenberg v. Heffron**, 9 Cir., 131 F. 2nd 80) and did not expire until July 6, 1957. On that date, having as a precautionary measure obtained an order from the Referee extending the time for filing such a petition (R. 24), the petitioning creditors, the Appellants here, filed their petition for review of the Referee's order dismissing the proceedings (R. 24-27). Appellants first endeavored to file the petition for review with the Referee, but the latter's Clerk refused to accept it on the ground that the Referee had concluded the case and, in accordance with the requirements of Section 39 (a) (10) of the Bankruptcy Act (11 U.S.C. 67(a) (10)) had transmitted to the Clerk of the Court below all of his records in the case. Having no other alternative in the circumstances, Appellants filed the petition for review with the Clerk of the Court below.

Within a day or so of the time that Appellants first learned of the Referee's order dismissing the proceedings, Appellants filed with the Court below a petition to vacate and set aside the foreclosure sale on the ground that it had been made before the time within which Appellants might petition for review of the Referee's order dismissing the proceedings had expired (R. 28-32).

On September 9, 1957 the Court entered an order denying both the petition for review and the petition to vacate and set aside the foreclosure sale (R. 33). On September 24, 1957, the Appellants moved to vacate this order on two grounds:

(a) The petitions denied by said order were not at the time of the entry of said order properly before the Court for the reason that as of that time the Referee had not

made or filed his certificate of the proceedings had before him as required by Section 39 (a) (8) of the Bankruptcy Act (11 U.S.C. 67 (a) (8)), and the Court did not have before it the record necessary to its passing upon said petitions.

(b) The petitioning creditors were afforded no opportunity to be heard in support of said petitions.

The Court thereupon modified the order so as to provide "that each of the said petitions be, and the same are hereby, dismissed without prejudice." The reasons for making this modification were recited in the order making it as follows:

> " * * * and it appearing to the Court that the provisions of Section 39 (a) (8) had not been complied with in that there was not now before this Court the Referee's certificate on petition for review; that petitioners could not comply with said section until such time as the Referee did file such certificate; that the facts as now presented to the Court indicate that petitioners should not be prejudiced because of the failure of the Referee to file such certificate; and to that end the order entered by the Court on the 9th day of September, 1957, should be amended; * * * "

Thereafter, the Referee filed his certificate on Appellants' petition for review (R. 37-40). This certificate was not filed until February 10, 1958 (R. 40). On February 26, 1959, the Judge of the Court below entered an order dismissing the proceedings, without passing upon the merits of either Appellants' petition for review of the Referee's order dismissing the proceedings, or Appellants' petition to vacate the foreclosure sale. This order was not entered on the bankruptcy docket until March 3, 1959, on which

day the Clerk of the Court below mailed notice of the entry thereof to all interested parties (R. 47). Notice of appeal was filed on April 3, 1959 (R. 47).

SPECIFICATION OF ERRORS

1. The Referee erred in dismissing the proceedings for want of jurisdiction.

2. The Judge of the Court below erred in refusing to pass upon Appellants' petition for review on its merits.

3. The Judge of the Court below erred in refusing to vacate and set aside the foreclosure sale under the trust deed.

4. The Court below erred in making the order dated February 26, 1959.

ARGUMENT

I.

THE REFEREE ERRED IN DISMISSING THE PROCEEDING FOR WANT OF JURISDICTION.

Section 2 of the Bankruptcy Act (11 U.S.C. 11) provides:

"(a) The Courts of the United States * * * are hereby invested within their respective territorial limits * * * with such jurisdiction at law and in equity as will enable them to exercise original proceedings under this Act * * * to

> "(1) Adjudge persons bankrupt who have had their principal place of business, resided or had their domicile within their respective territorial jurisdictions for the preceding six months, or for a longer portion of the preceding six months than in any other jurisdiction. * * *"

Section 32 of the Bankruptcy Act as amended in 1952 (11 U.S.C.A. Supp. 55; 66 Stat. 424) provides in pertinent part as follows:

> "(b) Where venue in any case filed under this Act is laid in the wrong court of bankruptcy, the Judge may, in the interest of justice, upon timely and sufficient objection to venue being made, transfer the case to any other court of bankruptcy in which it could have been brought.
>
> "(c) The Judge may transfer any case under this title to a court of bankruptcy in any other district, regardless of the location of the principal assets of the bankrupt, or his residence, if the interests of the parties will be best served by such transfer."

Under these provisions, even if this case had not been brought in the proper district, as prescribed by Section 2 of the Act, the Court should, nevertheless, have retained jurisdiction of the case if the interest of justice so required. Thus, in **In re Lada Radio & Electric Co.**, 132 F. Supp. 89, 90, the Court said:

> "Subdivision (b) is more restricted. Instead of being applicable to any case, it comes into play only where a case is 'laid in a wrong court of bankruptcy' and even then the court is limited to a transfer 'to any other court of bankruptcy in which it could have been brought.' Thus subdivision (b) deals only with proceedings brought in the wrong district and gives power to transfer such a proceeding only to a district in which it could have been brought. Moreover, this can only be done in the interest of justice. That sounds as if Congress were directing that a case laid in the wrong district should stay there unless the interest of justice required that it be transferred to a district where it ought to have been brought. I cannot believe

that this is the correct interpretation of the subdivision. A somewhat more reasonable interpretation is that the intention of Congress was to provide that a case laid in the wrong district need not be dismissed if the interest of justice requires that it be transferred to a district in which it could have been brought. Still a third interpretation, and the interpretation which I adopt, is to be found in the report of the House Judiciary Committee which accompanied the bill. House Report No. 2320 on S. 2234, 82nd Cong., 2d Sess. 1952. It deals with this subdivision (b) referring to it as the first of the subdivisions which the bill proposed to add, and says, 'Under this first subdivision, the Judge may, upon timely and sufficient objection, transfer a case brought in the wrong court of bankruptcy * * * Ordinarily, no doubt the venue rules in bankruptcy will serve the interest of justice, but in the event that in a special case they do not, the Judge will have discretion to retain the proceeding.'

"Thus we have subdivision (c) which permits a transfer of a case 'if the interests of the parties will be best served' and subdivision (b) which, as interpreted by the House Committee, permits the retention of a case in the wrong district in the interest of justice.' The whole field is thus covered. A case rightly or wrongly brought within a district may be **transferred** wherever convenience, represented in one case by the 'interests of the parties' and in the other 'interest of justice' requires. A case rightly brought within a district may, of course, be **retained** there if the interest of justice requires, and under subdivision (b) a case wrongly brought within a district may be **retained** there if the interest of justice requires."

The rules announced in **In re Lada Radio & Electric Co., supra,** were followed by the United States Court of Appeals

for the Tenth Circuit in **In re Martinez,** 241 F2d. 345. In that case the trial court dismissed a bankruptcy on the ground that it had been brought in the wrong district. The Court of Appeals reversed, saying:

> "Under Subsection C of Section 32 the Judge could transfer the instant case to a court of bankruptcy in any other district if the interests of the parties would be best served by such transfer, and under Subsection B of Section 32 the court in the absence of objection could retain the proceeding in the instant case unless it concluded that the interest of the parties would be best served by a transfer to some other district."

In view of the foregoing, it is plain, we submit, that since the amendment to Section 32 of the Bankruptcy Act in 1952 (66 Stat. 424) the provisions of Section 2(a) (1) of that Act (11 U.S.C. 11) can no longer be treated as a limitation on the jurisdiction of the court, but only as a provision prescribing venue. Under Section 32, as amended, if a proceeding is brought in a wrong district, the Court must either transfer the proceeding to the proper district or retain jurisdiction thereof, as the interest of the parties and justice might require. It cannot, however, dismiss the proceeding.

In the case at bar, the interests of the parties and of justice required that the Court retain jurisdiction. All of the debtors' assets (with negligible exceptions) were located in the District of Nevada. Most, if not all, of his debts were contracted in that District, and the great majority of his creditors were either residents of Nevada or had places of business therein.

The order of the Referee dismissing the proceeding for want of jurisdiction was, therefore, plainly erroneous.

II.

THE COURT BELOW ERRED IN REFUSING TO PASS UPON APPELLANTS' PETITION FOR REVIEW ON THE MERITS.

Appellants' petition for review of the Referee's order dismissing the proceeding was filed on July 6, 1957, well within the time permitted by law, and the Referee's order extending the time for filing it. The petition, it is true, was filed with the Clerk of the Court below and not with the Referee, as provided by Section 39(c). The reason for this, as hereinbefore recited, was that the Referee had closed the case and, in accordance with the requirements of Section 39(a) (10) of the Bankruptcy Act (11 U.S.C. 67 (a) (10)) had transmitted to the Clerk of the Court below all of his records in the case, and for that reason the Referee's Clerk refused to accept the petition. Plainly, therefore, the Appellants had no other course to follow than to file the petition with the Clerk. Quite apart from this fact, however, the Referee treated the petition for review as having been properly filed before him, as he filed, in pursuance of that petition, the required certificate for the purpose of permitting his order to be reviewed. **In re Wood,** 6 Cir., 248 F. 246; **certiorari** denied, 247 U.S. 512; 62 L. Ed. 1243; 38 S. Ct. 579. The case last cited was decided before Subsection (a) 8 and Subsection C, Section 39 of the Bankruptcy Act (11 U.S.C. 67 (c)) were added by the Chandler Act (30 Stat. 555) in 1938. But at that time, General Order in Bankruptcy 27 was in effect. That General Order was substantially identical to Subsections (a) (8) and Subsection c of Section 39, the present statutory provisions differing from General Order 27 only in this: That whereas the present statutory provisions limit the time within which a petition for review may be filed to ten days, General Order 27 did not, in express terms, limit the time for filing a petition for review, although a ten day limitation was,

by judicial construction, read into it. General Order 27 provided as follows:

> "When a bankrupt, creditor, trustee or other person shall desire a reviewing by the Judge of any order made by the Referee, he shall file with the Referee his petition therefor, setting out the error complained of; and the Referee shall forthwith certify to the Judge the question presented, a summary of the evidence relating thereto, and the finding and the order of the Referee thereon."

Subdivision (c) of Section 39 provides:

> "A person aggrieved by an order of the Referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the Referee a petition for review of such order by a Judge and serve a copy of such petition upon the adverse parties represented at the hearing. Such petition shall set forth the order complained of and the alleged errors in respect thereto. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of the parties in interest."

Subsection (a) (8) provides:

> "(a) Referees shall * * * prepare promptly and transmit to the clerk certificates on petitions for review or orders made by them, together with a statement of the statements presented, the findings and orders thereon, the petition for review, a transcript of the evidence thereof, and all exhibits."

In the **Wood** case, **supra**, the petition for review was filed with the Clerk. The Referee made and filed a certificate in pursuance thereof. The Court of Appeals held

that the petition was as effective as if filed in the first instance with the Referee and later by him filed with the Clerk.

The petition for review must, therefore, be deemed to have been properly and timely filed.

The Court below denied Appellants' petition for review because it had, by the order dated September 9, 1957, as modified by the order dated October 8, 1957, denied the petition and no new petition had been filed. But, as we have heretofore pointed out, the only reason that the petition was then denied was that the Referee's certificate had not been filed.

We submit that the Judge of the Court below erred in refusing to pass on the petition for review on the merits.

III.

THE COURT BELOW ERRED IN REFUSING TO VACATE AND SET ASIDE THE FORECLOSURE SALE.

The Court below, we submit, was clearly in error in refusing to vacate and set aside the foreclosure sale of the alleged bankrupt's principal asset.

There is a division of authority as to whether or not a mortgage or trustee under a deed of trust containing a power of sale may sell the property after the filing of a petition in Bankruptcy Court. See **Collier on Bankruptcy**, 14th Edition, Vol. 1, Sec. 2.62(2), p. 285 and the cases collected in the annotations in 112 ALR 508 at p. 515, **et seq.** This question, however, is not presented in this proceeding for the reason that an injunction against the sale of the property by the trustee, enjoining it from selling the property, had been applied for and a temporary order had been issued, and the sale was made while the petition for

review was pending. In these circumstances, the sale is subject to being vacated under the well established principle that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined, the Court may, by mandatory order, restore the **status quo.**

Porter v. Lee, 328 U.S. 246, 251; 66 S.Ct. 1096; 90 L. Ed. 1199,

Texas and New Orleans R. Co. v. Northside Belt R. Co., 276 U.S. 479; 48 S. Ct. 361;

Henderson v. Flickinger, 136 F. 2d 381.

In the **Porter** case Mr. Justice Black expressed the rule as follows:

> "It has long been established that where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined, the court may by mandatory order restore the status quo."

This rule, as the above cited cases show, applies even where the injunction has been denied by the trial court and the acts sought to be enjoined are completed during the pendency of an appeal.

CONCLUSION

It is respectfully submitted that the order appealed from should be reversed and the court remanded with instructions to set aside the Referee's order dismissing the proceeding for want of jurisdiction and to determine on its merits Appellants' petition to vacate the foreclosure sale.

Respectfully submitted,

MAGLEBY & POSIN, and
ALBERT M. DREYER

By_____

Receipt of copy of the foregoing brief is hereby admitted this _____ day of November, 1960.

HAWKINS, CANNON & KELLY

By_____

GOLDWATER & SINGLETON

By_____

Attorneys for Appellee